IN THE UNITED STATES COURT OF FEDERAL CLAIMS

F. LEE BAILEY, Plaintiff, vs. THE UNITED STATES, Defendant.	No. 96-666C (Judge Horn)

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[1801] THE COURT: We've just about come to the end of the trial, and it's now I guess my turn to talk a little bit and tell you what I need to close out this case and to review all of the testimony and the documentary evidence that's been introduced to the Court.

[1802] First let me thank you, all the participants, the lawyers, the paralegals, for what I think has been in many ways a very easy trial. It's always nice for me to have cases in which the lawyering on both sides is at the high end of the profession and where I don't have to deal with mechanical breakdowns on a regular basis.

Of course, we have lots of cases in which that's true. We have many situations in which lawyers simply don't know their way around the courtroom, and that becomes a much more difficult trial. We didn't have any of those problems here. Everybody was obviously competent and highly so and with good support from paralegals on both sides or investigators or whatever they chose to use as particular support.

As a result, I think we have had a trial that flowed relatively well. It obviously took a little longer than any of you all thought and probably than I hoped, although I projected this extra week a long time ago and reserved the courtroom for that reason. It just seemed to me, looking at the witness list early on, that it was going to be very, very difficult to complete it in the time allotted, particularly since I think all of us knew that this is a case that runs with very high emotion and in which credibility and bias would quite obviously be a question.

[1803] When you have that kind of testimony, the cross-examination generally takes a little bit longer and is not necessarily as predictable as it might be if all you're doing is eliciting simple fact testimony.

The theme of inconsistencies in here is obviously something that means that I'm going to need your help to point out, number one, what you think might be inconsistencies for one side and on the other what might not be inconsistencies. It goes in multiple directions. I mean, the arrows shoot back and forth from side to side on this issue on a lot of the witnesses on a lot of the evidence.

It's for that reason, and I think I've said this before, but I don't know that I can say it often enough. Your post-trial briefings really need to be incredibly precise, very specific references to trial transcript pages and lines, very specific references to exhibits, pages, paragraphs, so that I can follow what it is that you believe is going on here. I've got my own view. Each of you have your own view. Right at the moment I can honestly tell you I'm not sure how it all falls out.

You will see from the questions that I will throw out to you where some of my areas of concern are. Be very, very careful, and I say this whenever we get to this stage in a trial in which I really don't have a final answer for you. I might not rule from the bench very often. I've done [1804] it occasionally, but that's only when I really know what I think I'm going to end up with and have done the kind of work and don't need to redo and relook at the evidence in the way that I think is absolutely mandated by this case.

I'm going to have to do a very careful review, read and scrub of what we've heard and what we've seen. If you've looked at, and I'm sure you have because all good lawyers do, some of my opinions, you'll see that I'm not too casual about fact finding and that in fact, if anything, tend towards adding in lots and lots of detail. My reason for doing that, frankly, is, first of all, I think that's my job. I am the fact finder.

Second, of all, although it doesn't bother me when the Court of Appeals reverses me – that's their job – it is easier for them to make a decision if I have filled the opinion with fact and made findings and especially credibility findings. That is generally left to the discretion of the Trial Judge because it is the Trial Judge that has had the opportunity to observe and make decisions as the testimony is coming out as to whether or not somebody is inherently believable.

One of the things that I try very, very hard to do in going into this case, because, of course, there's been lots of discussion both in the motions that have preceded the trial and just in our status conferences and whatever,

[1805] in our settlement conferences that have a lot of emotion in it. I tried to walk in here, and I think successful did, without prejudging anything or anybody.

I have been surprised by myself in some of my reactions to some of the people. You will see when the opinion comes out I took very, very careful notes on bias and credibility and what I considered to be credible testimony. You will see when the opinion comes out that there are some disturbing elements as far as I'm concerned with respect to the credibility of some of the witnesses, and witnesses who I believe should have been unimpeachable starting from the beginning.

I've been a government public servant for many, many years in various capacities at the Executive Branch and then in the Judicial Branch, and I really do believe there is an incredibly high duty on the part of government officials to perform their responsibilities absolutely above impeachment and absolutely for the benefit of everyone, all citizens, and also to make sure that when confronted, comfortable or not, they will come up with what is an honest review of the events.

The comments that were made, the documentary evidence that's in, the biggest risk as I see it, and I heard a lot of it – I heard some of it in closing and heard some of it in the questions that were asked summarizing [1806] testimony. There is a very serious question about being sure to take all comments, particularly in the oral testimony – not so much in the written documents, but in the oral testimony – in context.

There was a fairly loose approach on the part of some people I think and at some points to take some comments

out of context or to broaden what was said into something that wasn't quite there, so when you do your briefings for me be very sure to include context for me so that I can really see where it's coming from.

I warn you that if I am uncomfortable with the context I am not at all shy in coming back to you for additional documentation or additional material that I might need to figure out the context, so bear this in mind as we get to what will be essentially the closing part of this wrap up discussion that you need to be sure that I've got everything I need for context.

By example, we just issued opinion shortly ago, and in the very last point at the analysis we realized there was a critical document missing. It obviously slowed everything down. We had promised to get that opinion out by a certain point. We would have met our obligation but for the fact that there was an absolutely critical document that had not been offered, nor had there been any explanation offered to us as to why it wasn't there. It turned out not [1807] to be there, but the parties had dodged the issue, particularly one side, knowing full well that that was a killer. It is a killer. It was a killer.

Dodging issues or taking something out of context is not going to get us to where we need to go with the kind of speed that I would like to resolve this case. This is obviously a very complicated fact pattern and at the very same time a very simple legal issue. Some would call it unusual, unique. The word extraordinary has been used a great deal during the course of the trial.

It is without question, and I think the attorneys all essentially acknowledged it, although some tried to deny

it. There is a theme of trying to deny it, but there is a unique fact pattern here. Some said it fits in and I think even in closing said this is just a normal, old fashioned criminal case in a sense. It's not.

We've got a lot of very, very expert and far more expert that I am criminal practitioners who have been part of this case, and the theme that I got from it is that there are big differences here. Now, are they big enough to take it out of the criminal context of the Duboc proceeding before Judge Paul? I'm not entirely sure of that answer yet, and that's one of the things I'm going to really look at hard, but there is no question that this is a unique fact pattern. My experience as a prosecutor tells me that. It's [1808] been a lot of years ago that I was a prosecutor, but this kind of thing has not changed that much. It's just not a standard case.

As you'll hear in a moment, I'll talk about two cases that we've identified that we want you to deal with, and there may be others. They are much more typical fact patterns, although some of the decision language in those cases does have a bearing on what we're doing.

One of the things that I've had to wrestle with a great deal since day one in this case is the natural and normal deference that any Trial Judge gives to another Trial Judge. Very difficult issues are raised here. I read a lot of Judge Paul's decision material. He has the reputation of a very honorable and fine Judge, and there is a presumption certainly if not in a legal sense then certainly in sort of a collegial sense that what he says and does is to be taken at its face value.

The issue that distinguishes this case potentially is, of course, that there was a point in time where this issue that we have before us here on the alleged contract was specifically carved out, and there was discussion in front of Judge Paul and I think a writing by Judge Paul – yes, I know a writing by Judge Paul – that says, you know, take it to the Court of Federal Claims if you want to. There is the problem that then there is a dismissal with [1809] prejudice and some very broad language in that dismissal with prejudice of anything flowing from this case. I've paraphrased it, but that's essentially what it says.

Those two things taken in counterpoint to each other raise the issue as to, you know, how to deal with some of the previous proceedings. If Judge Paul was right the first time when he said take it to the Court of Federal Claims, then we have a jurisdictional issue obviously. We have jurisdiction to deal with it.

Those particular remarks, the various Orders that he issued, need to be examined by me much more carefully than I have today to see their effect. I am convinced that no other proceeding and no other presiding official has had the opportunity that I've had here to explore this issue as fully as I've had the opportunity and with a focus deliberately on that issue. I think that is important.

There are a number of levels on which I will issue a decision. Obviously there will be a winner or loser or maybe a half winner or half loser. That's a possibility, as you'll see by some of my questions later. I will also make specific findings on the credibility of the various witnesses who appeared in front of me.

One of the things that is so clear here is there is so much stuff – stuff for lack of a better word – that is flying around in satellite form to the main issues in [1810] this case. There are so many people with independent agendas, so many people with personal egos, so many people with reputations that they feel have been challenged by this set of circumstances. What I have to do is carve all that off and come up with an answer on the alleged contract.

There is no doubt in my mind as I've sat through these proceedings that my decision to deny the earlier two motions was correct and that Mr. Bailey very clearly deserved his day in Court. Whether he'll win or lose, he deserved his day in Court, and I think we have offered that to him as a result of this trial.

A dispositive motion would simply not, in my opinion, have been the way to deal with the case based on the fairness that's required and the duties that are assigned to me as a Judge of the Court of Federal Claims. That doesn't mean that we don't look at some of the prior proceedings, particularly Judge Paul's, to see what, if any, preclusive effect any piece or portion or particular writings or hearings should be given greater weight or not.

During the earlier motion practice it was really very difficult for me, and that's what was troubling me in that motion practice, to judge how all of these ancillary proceedings were related. They were thrown around in different pieces and forms and out of context. Everybody obviously chose what they liked best.

[1811] I really did not understand during the motion practice time how all of this was interrelated. I had some

idea, but I think I've got a much better understanding of that now, and I think I can come to much better conclusions as to the weight.

One of the issues that we talked about in terms of the admissibility of documents is obviously to what extent a non-final set of proceedings in the Florida Star Bar process should be introduced, and certainly if there's a final decision, Mr. Belkin, we expect that you will get it to us very quickly. I suspect you will do that at that time in compliance with that request to you.

The use of those bar proceedings for impeachment purposes for particular witnesses was appropriate, and we had certainly used it for that. The question is the findings that have been made this far by interim officers, as I ruled during the course of the trial, I felt were not appropriate for our use at this point.

Similarly, the material that was offered by the parties during the course of the motion practice and dispositive motion practice on the issue of authority to contract was woefully incomplete and extremely confusing. There were a lot of things thrown around – normal procurement authority, which I don't know that it applies, the relationship between the U.S. Attorney's Office and [1812] particularly the U.S. Attorney or the AUSAs with respect to their authority versus Washington authority of the Department of Justice. The relationships there certainly I think I understand a little bit better now and did not fully comprehend at that time, which was part of my reluctance again to rule on this case in a dispositive motion format.

There is probably nothing surprising in my telling you that both parties need to address the very serious issues of credibility raised with respect to a number of the witnesses. It must be a slightly different world than the one I live in for major criminal practitioners, but they all seem to be saying things about each other and going back and forth.

I do remember some of this certainly from my prosecutor days, although my prosecutor days were at the much more mundane state level where generally we got rather more routine cases. I was involved in a number of organized crime cases where we got some of this going on, but this is a different world. There really isn't a lot of harmony that we've heard between all of these practitioners. Credibility is a tremendously important issue, and bias, which is, in my view, the next step up, so to speak, from credibility.

We often are asked to assess the credibility of witnesses in the practice that we're involved in; even of expert witnesses. Did they do their homework? Did they put [1813] garbage into the computer and, therefore, get garbage out? What we've got here is flat out bias, real dislikes, and that's probably too mild a term, between various people testifying. Therefore, without any question, there are real issues on that subject.

I will say to you that one of the things that I found remarkable, and please don't take away any comment about how I will rule on the case ultimately because that's not it, but it is with respect to the issue of bias that I say this. I found the only person who testified with any lawyer-like demeanor was Mr. Bailey.

That doesn't mean he's got a winner here, but it was remarkable how each of the other key major criminal practitioners who got up here, and I'm talking about the private practitioners now and some of the public ones too, actually – I should revise that – used adjectives, used phrases, used passion, got pretty agitated as they were testifying.

Mr. Bailey remained calm, gave his version of the story, and that's one of the things that is clearly working through my mind at this point and is clearly a problem when you get witnesses who cannot, especially lawyer witnesses. I mean these people are professionals. They're trial courtroom lawyers, and they couldn't do what I'm sure each of them told their clients to do, which is to remain calm, [1814] to appear absolutely objective. There were a lot of instances in which that wasn't the case. We have to deal with that.

With respect to forfeitable assets, I think there is a question here as to whether or not the Biochem Pharma stock arguably was not forfeiture as a product of a legal Canadian drug activity or for some other reason. There certainly are questions related to the timing of the forfeiture and whether by delaying the forfeiture in the case of the Biochem Pharma stock that took it outside of the forfeitable assets.

There seems to be a lot of testimony that this was in the forfeitable asset estate. The question is how that was handled. The U.S. Attorney's Office took out of the forfeitable asset estate properties on behalf of – on behalf of is probably a bad word, but that ultimately were going to stay with both Robin and Raymond Duboc, so they had

the authority apparently, or so they believed, to do that. Why would the Biochem Pharma stock not also be in that?

If in fact the theory is that all of Claude Duboc's assets, because of his major drug activity and because of the length of his activity, were to be included in the forfeited estate then why is it different for the Biochem Pharma stock versus the Raymond Duboc and Robin Duboc properties?

[1815] Similarly, I don't think there is a lot of particularly probative value to the fact that the Japanese stocks and the Biochem Pharma stock were handled differently. If the Japanese stocks, and they never were, were not carved out of the forfeited estate then clearly they would be sold and returned to the authorities. That's what was intended with that stock. It appears that there's some question at least whether something different was intended with respect to the Biochem Pharma stock. Since certain assets were carved out, why not this one?

I think that's a very, very difficult question in this case, and I don't know the answer, frankly. Consistency. We're back to that. Not one that you mentioned, Mr. Horwitz, but another example I think of the inconsistencies in this case that need to be addressed in the final opinion.

That, of course, ties into the question of whether or not the government possessed legal title at any point, and I think the testimony is relatively clear, frankly, that they are arguing that they did not and that in fact they would have had to go through a forfeiture proceeding, which they ultimately did in front of Judge Paul, to include it in

that forfeitable asset estate. It was, however, done well after the fact. It was never done with the Raymond Duboc and Robin Duboc properties, and again that isn't quite a [1816] match and another one of the potential inconsistencies.

I do want you to address what the substitute assets concept has to do with this case and how it plays into the case and also whether or not, and I think I may have said this already, you can delay the forfeiture assets to allow for the maintenance and liquidation of other drug assets and how that would work out.

From the liquidation efforts I want you to address whether or not it is theoretically possible for the government to contract to maintain and liquidate overseas assets, overseas drugs assets, with a third party having no relationship with the case. That would be true really for assets that are in a drug estate, forfeiture estate, or assets in some way outside of that. I'm not sure.

Could the U.S. Attorney's Office contract for services of some sort with an attorney? In theory, I think the answer has to be yes. It's not done very often, and obviously the arrangement that was made here with Biochem Pharma stock and the maintenance of the French properties is not done very often either so that raises some serious issues.

Take a look at the plea agreement. It's obviously an important document in this case. What is interesting about it, and it will become even more clear why I'm so concerned about this when we talk about a couple of the [1817] cases that I want to address. The plea agreement didn't mention the Biochem Pharma stock.

Prior to the plea agreement, the stock was transferred to Mr. Bailey. The stock was left with Mr. Bailey after the plea agreement, during the plea agreement, to use and to maintain and liquidate the French properties. The question obviously raised is did the conduct of the parties, including Judge Paul here and the U.S. Attorney and the AUSAs as the U.S. Attorney singular and the AUSA as plural, did their conduct indicate that they really didn't intend to upset the earlier agreement with how to use the Biochem Pharma stock, whether trust or other contract or anything else?

The agreement alleged to be a contract was in place before the plea, after the plea and really didn't come unglued until a lot of other things happened. The timing is an issue that you need to deal with. If in fact there was a contract in place before the plea agreement and for some time thereafter, which subsequently the actions of the Court in the Northern District of Florida caused the government not to be able to perform, does that mean Mr. Bailey gets damages? We haven't really talked about that a whole lot. It wasn't really raised by the parties, but is I think an issue that I would like you to address.

This was an unprecedented arrangement apparently. [1818] Many of the witnesses have, as I indicated earlier, testified to that effect, and I'm interested in hearing from the government in this instance whether they acknowledge that it is and was an "unprecedented", extraordinary, whatever word you want to use, arrangement.

With respect to the alleged contract, very specific questions starting with can there be an express contract as alleged in Count I of the complaint when the alleged

contract is an oral contract, or is a writing required for an express contract? Compare the express contract in this regard to an implied contract as alleged in Count II of the complaint, which is generally manifested by the conduct of the parties.

The meeting of the minds question raised in closing argument by Mr. Belkin is a serious, serious issue. Many of the witnesses seem to have a different view as to what the arrangements were between Mr. Bailey and the government. The question is does this indicate that there was no meeting of the minds, which is, of course, required for a formation of the contract?

The witnesses stack up in different ways, depending on which side you're on. Mr. Bailey is probably not alone in his recollection of the events based on the testimony, but one of the witnesses is a government witness, Mr. Kirwin, who I found thus far, and I'm going to go back [1819] and read it, and obviously everything I'm saying here today is a preliminary reaction that could be revised once I go back and really, really pull this testimony and the documents apart.

I found Mr. Kirwin, of all of the Assistant U.S. Attorneys, to be the most credible, which makes him a vital player in this multi-action play. He was not comfortable on the stand, but I felt that he was trying to be forthright and trying to be honest about what he said. He didn't like where he was. You could see that. He was not enjoying this opportunity to testify, but he appeared to me to be very, very straightforward.

Some of the others, frankly, I am struggling with. Where I will come out at the end of the day on the others

I don't know, but my initial reactions, and these are initial reactions, just like it's an initial reaction to Mr. Bailey that I described earlier. My initial gut reactions, and I've been doing this for a long time, were that Mr. Kirwin was in fact the one who was trying to be most forthright amongst a lot of other witnesses. Again, I took copious notes with regard to demeanor, credibility, reactions, because it becomes so important ultimately in this trial. I will go back and review those notes.

If we don't have a meeting of the minds, what we could have on our hands is, you know, something that no one [1820] is really lying, no one is really making up post rationale concepts, but that you had a bunch of meetings and a bunch of sessions in which everybody simply walked out of the room with different understandings. That, as we know, in daily life does happen. The question is is that what happened here?

There's a lot of room here for potential for not necessarily talking about the same thing because what we have going on to some extent is the question of a fee, a traditional fee for the services for representing Claude Duboc as a criminal defense attorney. We have fees for repatriation of the assets, and we have this other question of the body of funds, which happens to be stock in this case, that was transferred to Mr. Bailey by the government with everybody's knowledge in the governmental institution. How does that play into it?

It would not be impossible, I think, for people to have walked out with a different understanding. This was unique. It was extraordinary. Nobody quite knew what to do with it, and there were lots of motives in here; the

government potentially to maximize the assets in a way that they don't traditionally do.

Traditionally this gets turned over to the Marshals, and if it's contraband they burn it. If it's assets they sell it. I can remember in my old days as an [1821] intern in the U.S. Attorney's Office watching big, big bonfires actually particularly of pornographic material, but they normally and traditionally dispose of forfeited assets.

Everybody was kind of trying to cut some kind of a deal here. Everybody had an idea of why they wanted to cut their deal. The question is did they all understand each other? It is a serious issue in this case. It's one that I ask you to pay particular attention to and to be sure that you give me the best you've got on this issue.

You can give me a little more understanding of why or if the Christina case has a bearing in this. Don't spend a lot of time on that one.

On the authority issue, from a legal perspective what I want you to do is to clarify the statutes, regulations, manuals, what each of these say about the authority to enter into this sort of contract. Don't come back to me and tell me it's a traditional procurement contract. It's not.

I am not exactly sure, Mr. Belkin, why you've given me that normal procurement authority. This just isn't it as I see it at this point. Maybe I'm wrong, but I don't see it, and I don't think anybody in the U.S. Attorney's Office saw it that way. There is no one from the witnesses out of the U.S. Attorney's Office or, for that matter, from main Justice who testified that this had to fit into the [1822]

level authority delegations commensurate with warrants to sign particular levels of expenditure. No one talked about that.

We all know that there are for traditional government procurement warrant levels above which individuals can't sign. It wasn't talked about contemporaneous to the events, or at least not in any testimony that I heard, and it wasn't talked about in fact by the witnesses who were trying to bolster their arguments at the end of the day here at this trial.

You need to address the question of the authority of the U.S. Attorney and then the AUSAs because I think Mr. Miller testified that he had the full authority to decide on which assets could be forfeited and which assets to in fact not forfeit for various reasons, whatever they might be; whether for eternity, as in the case of Raymond Duboc and Robin Duboc assets, or whether, as he testified, temporarily for use and maintenance in the French properties as he believed he was doing or he testified he believed, and I'm not sure what he believed at this point. He testified that that was the arrangement he made with Mr. Bailey.

There are several cases that talk in and around this subject matter; two in particular that need some attention. We haven't really had much discussion of these. I read them very carefully. Particular parts ring out to [1823] me. I think most are distinguishable again because of the unique situation that we've got here, but they're certainly sort of in the area and should be dealt with.

The first one is the Sadeghi case. I'm not sure I'm saying it properly, but it is Sharom Amir Sadeghi, S-A-

D-E-G-H-I, v. United States, 46 FedCl 660. It's a May, 2000, case. That case raises some issues in which the plaintiff argued that there was an oral agreement which included an implied promise by the government to protect the plaintiff from retaliation from a foreign government if he cooperated with the U.S. Government.

The U.S. Government ultimately denied any obligation to protect him, and there was a lot of talk in that case about administering the criminal justice system was at the heart of the sovereign action and that a breach of contract arising out of a criminal justice system does not ordinarily give rise to an action under the Tucker Act.

The Court found in Sadeghi that the alleged promise to protect the plaintiff was part of a larger plea agreement and that the plea agreement was a sovereign act and found no specific authority and no specific language spelling out the liability of the government. Plaintiff's complaint was dismissed.

The obvious difference here is that this is the criminal defendant himself who is making this claim, so that [1824] places him much more clearly in the jurisdiction of the sentencing Judge. Also, there was no outside attorney, person, whatever, who's alleging the contract at issue so it is quite different, but it is something that has some language that has a bearing.

The Sadeghi case relied very, very heavily on an old Court of Claims case, Kania v. United States, K-A-N-I-A, 650 F2d 264, a May, 1981, case. That case also I believe is distinguishable, but it also had language in it and talks about the authority question that I think needs to be dealt with.

Again we're talking about a criminal defendant and not an outside person, but the language in Kania surprisingly, because Sadeghi relies on it so heavily, actually says by the same line of reasoning we would deem it possible to make a binding contract subject to Tucker Act jurisdiction creating liability for a breach of a plea bargaining agreement or one to grant immunity for giving testimony or to protect a witness.

What Kania says is this kind of deal is not completely out of the realm of possibility. They didn't find it in the particular case and the particular facts that they had in front of them, but certainly didn't shut the door.

The Sadeghi case, as all of you know, is not [1825] binding on me. The Kania case is a more difficult question, and Kania I think has a somewhat different result from Sadeghi. I would not want to ignore the Sadeghi case. I try to give careful consideration to the decisions of my colleagues on the Court, but, as you know, technically speaking they are not binding on my decisions.

In that regard, I would ask you to also, and we will certainly – I guarantee it – look for other cases, and this is our preliminary kind of view of this, that have or talk about fact patterns that are relevant to what we have before us here and language in those cases that may shed some light.

Because of the uniqueness of this case, because of the issues that we've got, I would ask that in your search for those other cases that you not confine yourself to binding precedent, but in fact do a broad search of federal law so that we can look for any guidance that might be out

there. I suspect there's not a lot, but what there is we should probably all look at.

On the questions of stock depreciation and appreciation, if all the drug assets were forfeited except for the Biochem Pharma stock and that stock then goes down in value, would Mr. Bailey have exposure for prior out-of-pocket expenditures from the line of credit secured by the Biochem Pharma stock at Credit Suisse and for his unpaid [1827] fees?

The government seems to acknowledge that they told Mr. Bailey that the Biochem Pharma stock was all that he was going to have available to him. Is it reasonable to conclude that if you have the risk of the stock going down in value, which apparently he clearly had, and the risk of not being able to take any fees or expenses out of what he did, which is not generally the intent of even U.S. Attorney offices when they work with someone, or of Courts, if he had those risks why wouldn't he also have the benefit of the bargain of the stock going up?

His version of which portion of the Biochem Pharma stock proceeds had to be accounted for, what had to technically potentially be returned up to the figure that he testified to, is something that you all need to address. There are again some major inconsistencies in how this all plays out and fits together. It is not unreasonable to think if you have risk downward that you have risk upward. Not, it's also not impossible to cut a deal that doesn't give you that benefit, and that's, of course, what we're all about.

Thinking about it, in that regard is the rise and fall of the Biochem Pharma stock really any different from the

rise and fall of the value of other stocks, such as the Japanese stocks that we've had some testimony on, the homes, [1827] the boats, the boat slip, the pending sale? In this case, however, the Biochem Pharma stock was kind of segregated into a different category. Again, a lot of inconsistencies.

On the flip side, is it difficult to go from an understanding that approximately $5.8 million or $6 million or whatever the number is – we've heard lots of numbers – in stock was all that was available to pay the costs and expenses to the conclusion that the Plaintiff would enjoy any benefit of the stock appreciation?

If the stock depreciated, we heard testimony that there wouldn't have been anything else to cover his costs and expenses and fees. He apparently was not going to be authorized to take it out of the French assets or anything else. Either way you look at this, you could come up with a logical or illogical pattern, and you all need to address that.

A lot of the witnesses, almost all of the government witnesses, professed to be unaware of the stock appreciation or profit from stock provision in the arrangements between Mr. Bailey and the government. Both sides in that regard need to really lay out that testimony.

We've got the conflict of issue interest in here. Was it a conflict for Mr. Bailey to be Mr. Duboc's defense counsel and also to cut this other contractual deal that he's alleged he had with the government? In one of my [1828] earlier opinions obviously I raised the issue. The issue still troubles me, but maybe less after the trial than it did before. Nonetheless, you need to address those issues.

We know that criminal defense lawyers, in fact all attorneys or most attorneys – I guess there are some exceptions – are not so altruistic as to want to do representation or work without getting some benefit of the bargain, and so clearly the question arises of why is it different from just a large fee in any other case?

We've heard large numbers. These were large fees. These were going to be large fees. Everybody acknowledged they were going to be large fees. They were talking about six or seven figure fees. I think Mr. Shapiro was the only one who was talking seven figures, but it could have been six figures. There were a lot who didn't testify as to numbers. Why is it so different? Was it a fee arrangement and nothing else?

The transfer of the Biochem Pharma stock to Mr. Bailey was clearly a government act. It also clearly, at least on paper or by the absence of paper, was done without reserving any explicit language of a trust or other limiting language, other conditions under which Mr. Bailey would deal with the Biochem Pharma stock. It's not there.

We have only testimony after the fact. We have only testimony after many years, or not so many, but a few [1829] years now of really, really bad relationships. People are very normal. People have trouble stripping out some of these emotions, and the question is without written documentation of what really the deal was we have to sort through the question of no limiting language. Maybe that's it. One of the cases that I mentioned to you does address that question of limiting language, but

probably not in a dispositive way for this case. The absence of limiting language is an important issue.

Similarly, the question of whether we're talking about one fee or two fees. If we're talking about one fee, it's a fee for anything that Mr. Bailey has done or would be doing in the course of any contact with the Duboc case. In the case of a two fee theory, it is a fee for his criminal representation and a fee for the work that he was doing in repatriation for the government as two distinct fees that should be viewed and dealt with and adjudicated separately and potentially adjudicated in two separately Courts, namely this Court and the Northern District of Florida District Court.

There is some confusion here, too, and some inconsistencies. We heard testimony that Mr. Bailey did not segregate his billing practices on these two things. We heard testimony that he simultaneously did the repatriation work and continued to have a relationship with Mr. Duboc. [1830] There are obviously memos in which he is still counseling Mr. Duboc prior to his release as attorney of record, but still counseling him, getting him medical attention, various and sundry things.

There's also a potentially confusing event in Judge Paul's rulings, which again obviously Mr. Bailey applied for and was granted, which were talking about a category of claimed "expenses", which were from the decision, related to the "upkeep and protection of Duboc's European holdings."

Again, is that an inconsistency because part of this was not dealt with? That phrase I think I cited – well, I know I cited it – in I think it's the second of my two

opinions. It troubled me then. It troubles me now and again needs to be addressed.

The fact that he was given the stock without condition apparently in writing at the time with no stated conditions as to how Mr. Bailey could manage the Biochem Pharma stock and in fact making him essentially personally liable for a lot of the expenses that were involved, although theoretically he could then dip back to the Biochem Pharma proceeds to cover those costs, the fact that he placed it in the Credit Suisse account, which account would not have accepted drug proceeds money.

I know when that all started because I was [1831] involved in the early days of getting the Swiss Government to take a look at these issues. They're very serious about it. It's not lightly dealt with, and yet everybody knew he was putting it into the Credit Suisse account. Nobody seemed to have a problem with it. This was certainly not done behind a dark curtain, and there were potentially understandings that this was now transferred to Mr. Bailey and was not part of the forfeited estate or else it would have potentially been a problem with Swiss law and with Credit Suisse. That's certainly an issue as well.

By the same token, we've talked about Judge Paul's role in this, the language that I cited you to in my second opinion. If Mr. Bailey's theory is correct and if the jurisdictional theories lie that this alleged contract has to be adjudicated in this Court, then in theory the question would be could Judge Paul even have awarded the fees for the work that is at issue in the case here.

Because of that language the question is raised does it makes sense for liquidation expenses to come from Judge Paul, but not the fees for liquidating which were incurred. I'm sorry. Let me start that one again because I don't want to get you confused here. I think my language may be confusing as I said it first. Does it make sense for liquidation expenses to come from Judge Paul, but not fees for the liquidator incurring those expenses.

[1832] Along with that, there needs to be an explanation, and I guess this one would have to come from the Plaintiff, as to why Mr. Bailey didn't seek either or both attorney's fees or liquidation fees from Judge Paul. It is sort of the same question.

Some of the testimony in this case makes it clear that Mr. Bailey believed he had gotten this stock with the responsibility to account for a certain minor portion of it really and that he went out and he used some of this money for some personal expenses. If he's correct, there's no problem with that. If there was a misunderstanding, that's all it is. If he knew he shouldn't have done that then it's a whole different story.

Those are among the types of issues that I'm wrestling with at this point. There will undoubtedly be more as I work my way through the trial testimony and through the exhibits, and there are undoubtedly others that either party needs to, should and wants to raise. My remarks are not exclusive, and I want you to understand that really clearly. I'm raising some of the issues that have jumped off the page to me during the course of the trial or even some before the trial, but this is not an all inclusive list by any means. In fact, it would be terribly

misleading to suggest that. I don't mean to suggest that by any stretch of the information.

[1833] In order to present your own views on what the issues are, you ought to do exactly that. Don't be confined by what I've said now. What I'm asking you to do, though, is not to be confined by the issues that I've just raised, but rather to include those in your discussions because they are issues that concern me and I believe need to be addressed.

Mr. Belkin, I don't understand your oral motion. That may very well be me just not getting it. Sometimes you need to explain it more clearly. Sometimes I'm not hearing it clearly. I'm not sure which it is. I don't fault you. I just need help. You're going to have to be a lot clearer on what that's all about.

I also think the damages calculations that were offered, although maybe crystal clear to you all, were not crystal clear to me and so please set it out very, very clearly. The complaints, in my experience, are probably not amongst the most helpful documents for ultimately deciding cases. They're very early in the case. They're intentionally vague often. The only document, in my opinion, in all of these things repeatedly we do as lawyers that's even less useful is the answer, but the complaints don't get you there, and this one doesn't, at least not for me.

The testimony has used lots and lots of numbers. [1834] I think I understood what you, Mr. Horwitz, used in your closing statement probably better than I had earlier, but just lay it out so that any idiot like me can figure it out.

We have got an issue to deal with, a mechanical issue; not a legal or a factual issue, but a mechanical issue, although it relates heavily to the context problem that I discussed earlier. We have scattered information taken from a variety of proceedings, and I'm not sure I've got enough to do the contextual analysis.

I'm not looking for baggage here. I'm not looking for volume. I'm not looking for tomes. I don't like extra paper. All that means is that I've got to read it. I do think I'm going to need transcripts of the proceedings before Judge Paul, and then I leave up to you what else we need to get.

On the issues of authority, on the issues of standard forfeiture practice or asset management, I do need the regulations/policy manuals that have been loosely referred to. I think honestly in this regard I have gotten odd portions. Very, very odd portions.

We still have that question, which I think you answered more fully, Mr. Belkin, but I only have one little piece of it with respect to the regulatory or manual information as to the date that it was relevant. From the information that you gave us the other day in Court, I took [1835] away that we probably need all of the above because it changed midstream in what we're doing.

It's not, in my opinion, only the day on which the deal was allegedly cut, but it's actually through the date that Mr. Bailey ultimately returned the assets because up until that point he's still managing some of these things. We need to complete the information that you offer to the Court on those issues.

I've asked, and I think, Mr. Horwitz, you were going to do, or were you going to do that with Mr. – I think it's probably more appropriate for someone to take the lead, but for you to give me a jointly reviewed document as to the Duboc docket sheet and its cross referencing to the exhibits that we have isolated in our exhibit books. I leave up to you – you're experienced attorneys – how you get that job done, but I do want it to be one that's been reviewed by both. I don't want later on for us to have a problem in this or any other regard.

We need to talk about the schedule and how it best serves the purposes of everyone, including the Court in this case, in terms of getting the post-trial briefing done and a decision made. As I indicated to you, for reasons of my own I don't want to protract this very far, but my idea of protracting and yours might be quite, quite different.

We've discussed briefly how this might impact some [1836] of the other proceedings, particularly the bar proceeding. My understanding from you all is that the final hearing is at the end of the month. I indicated to you I don't want it to become an issue to a motion for reconsideration. Certainly some of the findings I will make, if not the ultimate finding, but certainly some of the findings on credibility are going to be part of this package.

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